RECENT DECISIONS.

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ATTORNEY AND CLIENT—CONTINGENT FEES AFTER SUBSTITUTION—RECOVERY.—An attorney contracted to render services in connection with an award for a contingent fee. After material progress had been made, other attorneys were substituted, who secured the final award. In an action on the contract, *held,* the attorney was entitled to the contract percentage of the amount involved. *Martin* v. *Camp* (1914) 146 N. Y. Supp. 1041.

The rule that a client has a right at any time to dismiss an attorney is well established. *Johnson* v. *Ravitch* (N. Y. 1906) 113 App. Div. 810. According to the weight of authority, this is merely a right to revoke the attorney's agency, but when exercised it does not nullify the contract between the attorney and client so as to prevent the former from bringing an action thereon for wrongful discharge. *Kersey* v. *Garton* (1883) 77 Mo. 645; *Moyer* v. *Cantieny* (1889) 41 Minn. 242. The measure of damages for such breach according to the prevailing view, is the contract price, and if that is a percentage of the recovery, the discharged attorney may collect it out of a judgment or award secured by the substituted attorney, or from money paid in settlement to the client. *Craddock* v. *O'Brien* (1894) 104 Cal. 217; *Mackie* v. *Howland* (1894) 3 App. D. C. 461; *Carlisle* v. *Barnes* (N. Y. 1905) 102 App. Div. 573; *McElhinney* v. *Kline* (1878) 6 Mo. App. 94. Others allow a recovery on the contract, but limit damages as if the action were *quantum meruit. Polsley & Son* v. *Anderson* (1874) 7 W. Va. 202. There are a few cases, however, which refuse the attorney any relief on his contract and relegate him to a *quantum meruit* for the value of his services. *W. U. Tel. Co.* v. *Semmes* (1890) 73 Md. 9; see *Henry* v. *Vance* (1901) 111 Ky. 72. The rule in the principal case would seem to be sound since it preserves a client's right to revoke the attorney's agency but does not allow him to nullify a valid contract without cause. As such a contract is entire and as no just apportionment of the fee can be made because of the peculiar nature of the services rendered, recovery of the entire contract price seems proper. See *Webb* v. *Trescony* (1888) 76 Cal. 621.

BAILMENTS—DOUBLE LIABILITY OF WAREHOUSEMAN—UNIFORM WAREHOUSE RECEIPTS ACT.—The plaintiff without the consent of the true owner, deposited grain in the warehouse of the defendant, who, upon demand, delivered it to the true owner. *Held,* by § 495, Art. 1, Ch. 8 of the Pol. Code of South Dakota, a warehouseman who issues a receipt for grain is estopped to deny the title of the person named in the receipt, and since no exceptions to this rule are provided by the statute, voluntary surrender to the true owner is no defense to an action by the holder of the receipt. *Street* v. *Farmers' Elevator Co. of Elkton* (S. Dak. 1914) 146 N. W. 1077.

By the common law a bailee was estopped to deny the title of his bailor. There were, however, two exceptions to this rule, and the bailee was permitted to defend the suit brought against him by the

bailor on the ground that the property had been taken from him by legal process, *Bliven* v. *Hudson River R. R.* (1867) 36 N. Y. 403; *French* v. *Star Union Trans. Co.* (1883) 134 Mass. 288, or had been surrendered to the true owner. *The Idaho* (1876) 93 U. S. 575; *Western Trans. Co.* v. *Barber* (1874) 56 N. Y. 544; *Wells* v. *American Ex. Co.* (1882) 55 Wis. 23. It would seem that in the principal case the court, in depriving a warehouseman of his common law defense and thus subjecting him to double liability, has misinterpreted the intent of the legislature. *Cf. Wheeler etc. Co.* v. *Brookfield* (1904) 70 N. J. L. 703. The Uniform Warehouse Receipts Act, now adopted in many States, specifically provides by § 9, Par. 3 that "a warehouseman is justified in delivering the goods to one lawfully entitled to possession," and this would seem to be the true owner, unless the negotiable receipt had been endorsed to an innocent purchaser for value. Under this statute a warehouseman should in the future be relieved from the double liability imposed upon him by this decision, except in South Dakota where the legislature has added § 62, not contained in the original act, whereby it seems the situation of the warehouseman in that State remains absolutely unchanged.

BANKS AND BANKING—INSOLVENCY—PAPER INDORSED FOR COLLECTION.—A bank, receiving paper indorsed for collection, mingled the proceeds with its general funds and later became insolvent. *Held,* by the general custom among banks, there was implied authority in the collecting bank to mingle the proceeds after collection, and since at that time, it was merely a debtor of the forwarding bank the latter could establish no preference over the general creditors. *Young* v. *Teutonia Bank & Trust Co.* (La. 1914) 64 So. 984; 64 So. 806.

When a bank receives commercial paper indorsed for collection it retains it as agent of the depositor. 11 Columbia Law Rev. 163. After collection, some courts, disregarding any question of custom, hold the collecting bank strictly to account as agent, and since it is the duty of an agent to keep the property of his principal separate, *Kansas State Bank* v. *First State Bank* (1901) 62 Kan. 788; *Nurse* v. *Satterlee* (1890) 81 Ia. 491, give the depositor the right to follow the proceeds as a trust fund into the assets of the bank. 13 Columbia Law Rev. 556. The weight of authority, however, treats banks receiving paper indorsed for collection as an exception to this general rule of agency, and permits the collecting bank to change its relation from that of agent of the depositor to that of debtor, because the custom among banks to mingle the proceeds is so general that it must be taken as an implied term of the contract of collection. *First Nat. Bank* v. *Wilmington & W. R. R.* (C. C. A. 1896) 77 Fed. 401; *Union Nat. Bank* v. *Citizens' Bank* (1899) 153 Ind. 44; see *Security Sav. & Trust Co.* v. *King* (Ore. 1914) 138 Pac. 465. If the bank, with which the commercial paper indorsed for collection is deposited, becomes insolvent before collection, it holds the paper as trustee for the depositor, and if it then fraudulently collects such paper and mingles the proceeds with its general funds the owner becomes a preferred creditor. *St. Louis etc. Ry.* v. *Johnston* (1890) 133 U. S. 566; *Western German Bank* v. *Norvell* (C. C. A. 1905) 134 Fed. 724.

CONSTITUTIONAL LAW—CIVIL STATUS OF CONVICTS.—In an action to recover upon a promissory note and to foreclose a mortgage executed by the defendant while confined in the penitentiary for a felony, *held,*

a person convicted of a felony has power to contract and to dispose of his property in order to employ counsel. *Byers* v. *Sun Savings Bank* (Okla. 1914) 139 Pac. 948. See Notes, p. 592.

CONSTITUTIONAL LAW—DUE PROCESS—POWER OF JUDICIARY TO REVIEW GOVERNOR'S ACTS.—In a suit against the governor and his military officers for suppressing an issue of a socialist newspaper, arresting its publisher, and pieing the type of one issue, a plea that the acts were done by order of the governor, in the course of putting down a belligerent insurrection, was held insufficient in law. The defendants then applied for a writ of prohibition. *Held*, the writ should be granted. *Hatfield* v. *Graham* (W. Va. 1914) 81 S. E. 533.

Most jurisdictions deny the judiciary the power to control the governor's acts by mandamus, even when his official duties are set forth by statute, *Sutherland* v. *Governor* (1874) 29 Mich. 320, and although his acting or refusing to act deprives the relator of a substantial right or office. *People ex rel. Broderick* v. *Morton* (1898) 156 N. Y. 136. In calling out the militia to suppress insurrection, the governor's judgment is final as to whether insurrection exists, and no court will entertain inquiries to the contrary. *In re Boyle* (1899) 6 Idaho 609; *In re Moyer* (1905) 35 Colo. 159. If a person is imprisoned by order of the governor for the purpose of restoring quiet in a strike district under martial law, his imprisonment is not without due process of law within the Fourteenth Amendment. *Moyer* v. *Peabody* (1909) 212 U. S. 78. It is strongly intimated, however, that in cases of flagrant injustice, or bad faith on the part of the governor, his acts might be subject to judicial review. *Moyer* v. *Peabody, supra*, p. 85. The suppression of a newspaper, however, would seem to be no greater interference with private rights than depriving a man of office or liberty, and in the absence of proof of bad faith the decision in the principal case seems to be a proper application of the established rule.

CONSTITUTIONAL LAW—POLICE POWER—MARRIAGE.—The Wisconsin Eugenics Law provides that no license to marry shall issue to any male person unless an examination by a licensed physician shows him to be free from any acquired venereal disease. *Held*, the enactment of this statute was a valid exercise of the police power. *Peterson* v. *Widule* (Wis. 1914) 147 N. W. 966.

The court in the principal case, in answer to the contention that the classification in the statute was unreasonable on the ground that it discriminated between men and women, declared that the distinction was based on sound reasoning and a practical recognition of medical statistics. See 12 Columbia Law Rev. 737. In deciding that the $3. fee payable to physicians for the examination as prescribed by the act was not unreasonably low, it was held that expensive laboratory tests were not within the purview of the act, since mere physical examinations and clinical tests, which can readily be performed for the prescribed fee, sufficiently disclose the presence of venereal diseases except those which are inherited and those which have been cured to such an extent that they are non transmissible. As inherited diseases are, in the majority of cases, not communicable, the act does not extend to them; and although the statute applies to acquired diseases which have reached the non-transmissible stage, it is thought that the community is not sufficiently harmed by the marriage of persons in that situation to warrant the application of expensive labora-

tory tests. Although the wisdom of legislation of this character is open to serious question, it would seem that, since marriage is a proper subject of legislation within the police power, the court was justified in upholding the legislative action.

CONSTITUTIONAL LAW—POLICE POWER—PENALTY.—A New York statute provides that the owner of a tenement house shall be subject to a civil penalty of $50, if any part of his premises is used for the purpose of prostitution. *Held,* the legislature did not intend to hold such owner liable without notice or guilty knowledge. *Tenement House Dept.* v. *McDevitt* (Sup. Ct. 1914) 147 N. Y. Supp. 941.

Criminal intent or guilty knowledge is often not a necessary element of a statutory offense. *Reismer* v. *State* (1912) 148 Wis. 593; *Commonwealth* v. *Mixer* (1910) 207 Mass. 141; 7 Columbia Law Rev. 59; but see 1 Bishop, Criminal Law (8th ed.) 174, n. 6. Whether or not the legislature has dispensed with the element of criminal intent is for the court to decide, not only from the language of the statute, but also from the subject matter, and the consequences that will follow the interpretation adopted. See *State* v. *Audette* (1908) 81 Vt. 400; *Commonwealth* v. *Weiss* (1891) 139 Pa. 247. Since the statute in the principal case makes the landlord liable for the acts of third persons over whom he has no control, the interpretation of this statute by the court would seem sound. To hold the landlord liable irrespective of his care in the selection of tenants, or knowledge of their moral conduct thereafter, would seem to be an unlawful extension of the police power, the means used not being compatible with the end sought. See *Ives* v. *So. Buffalo Ry.* (1911) 201 N. Y. 271; *Daugherty* v. *Thomas* (1913) 174 Mich. 371; 10 Columbia Law Rev. 751. Although it is well settled that tenement houses are proper subjects for regulation under the police power of the state, see *Health Dept.* v. *Rector* (1895) 145 N. Y. 32; *Tenement House Dept.* v. *Moeschen* (1904) 179 N. Y. 325, it may be doubted whether they are distinguishable from other classes of rented property with respect to the evil which this statute is designed to prevent. This question of class legislation, however, was not considered in the principal case.

CONTRACTS—CONSIDERATION—EXTENSION AGREEMENT.—After maturity of a note the creditor promised to extend the time of maturity and forbear suit for a definite period, in return for which the debtor paid a sum less than the amount of interest then due. *Held,* there was no consideration for the promise to forbear during the period of extension. *Maker* v. *Taft* (Okla. 1914) 139 Pac. 970.

Since the performance of or promise to perform a legal obligation does not furnish sufficient consideration to ground a promise, part payment will not support a promise to discharge the entire debt. Anson, Contracts (2nd Am. ed.) 104. For this reason some courts hold that a promise to pay for a definite time after maturity, interest not yet accrued on a note, furnishes no consideration for a promise to forbear suit during that period. *Wilson* v. *Powers* (1881) 130 Mass. 127; *Abel* v. *Alexander* (1874) 45 Ind. 523; see *Olmstead* v. *Latimer* (1899) 158 N. Y. 313. But as the law enforces payment of interest only for the indefinite time that a note remains unpaid, the promise to pay interest for a definite period would seem to change the nature of the obligation, thereby constituting good consideration; and this point of view has been adopted by several jurisdictions. *Chute* v.

Pattee (1854) 37 Me. 102; *Lorimer* v. *Fairchild* (1904) 68 Kan. 328; *Lahn* v. *Koep* (1908) 139 Ia. 349. A more convincing argument seems to be that by promising to pay interest for a definite time after maturity, the debtor expressly or impliedly promises to forego his legal right of paying the principal before that time, in order to avoid further payment of interest. *Lahn* v. *Koep, supra; Reed* v. *Tierney* (1898) 12 App. Cas. D. C. 165; see *Templeton* v. *Butler* (1903) 117 Wis. 455. Where, however, the debtor pays or promises to pay, interest already due, as in the principal case, it seems clear that there is no consideration for a promise to forbear since it is merely the performance of a legal obligation. Anson, Contracts, *supra.*

CONTRACTS—PUBLIC POLICY—SECRET AGREEMENT TO PAY FOR CONDUCTING A RECALL.—The defendant engaged plaintiff to organize and operate a campaign to recall municipal officers. The defendant's connection with the movement was to be concealed. *Held,* the contract is against public policy and void. *Stirtan* v. *Blethen* (Wash. 1914) 139 Pac. 618.

It is generally held that when a person agrees for consideration to exert his personal influence in an election, the resulting contract is against public policy. *Swayze* v. *Hull* (1824) 8 N. J. L. 66; *Whitman* v. *Ewin,* (Tenn. 1897) 39 S. W. 742; see *Keating* v. *Hyde* (1886) 23 Mo. App. 555. The reason for this rule seems to be that such contracts, whether or not actually venal, tend toward corruption, see *Whitman* v. *Ewin, supra,* especially if the contract is secret. See *Livingston* v. *Page* (1902) 74 Vt. 356. When, however, such a contract obviously does not have such a tendency, as where the services to be rendered are manual or clerical, *Hurley* v. *Van Wagner* (N. Y. 1858) 28 Barb. 109, see *Keating* v. *Hyde, supra,* or consist in political speech making, only, *Murphy* v. *English* (N. Y. 1883) 64 How. Pr. 362, the courts generally hold them valid. Since it was secret, the contract in the principal case is clearly unenforcible. If that aspect of the case were eliminated, however, it would seem that the contract might be upheld, for it does not appear that any of the acts contracted to be performed by the plaintiff tended toward corruption. Fair and open advocacy of a recall, even for pay, would seem to be no more against public policy than similar advocacy of a measure before a legislature, and contracts for the performance of the latter service are regarded as proper, so long as the methods to be used are legitimate, and the remuneration is not contingent. See *Marshall* v. *Baltimore and O. R. R.* (1853) 16 How. 314, 334; *Trist* v. *Child* (1874) 21 Wall. 441, 450. It might be argued, however, that sound public policy would require that the recall be exercised only in response to a free and powerful public sentiment, and that since the petition in the principal case may well be regarded as the expression of the whim of an individual, the decision is sustainable on this ground alone.

CORPORATIONS—DIVIDENDS—AVAILABLE PROFITS.—A corporation, being compelled by court order to dispose of certain stocks, exchanged them for stocks of another corporation at a profit of $65,000,000 on the original investment. At the same time the conversion of a large number of $175 bonds into $100 shares transmuted $15,000,000 from liability to profit. These two sums being made the basis of a special dividend of forty per cent on the common stock, certain preferred stockholders objected. *Held,* this was a proper dividend based on

profits. *Equitable Life Ins. Co.* v. *Union Pac. R. R.* (N. Y. 1914) 106 N. E. 92.

For a discussion of the principal case in the lower court and the principles involved, see 14 Columbia Law Rev. 524.

CORPORATIONS—POOLING AGREEMENT OF STOCKHOLDERS—SPECIFIC PERFORMANCE.—The plaintiff, defendant, and another, holding a majority of the stock in a banking corporation, agreed to pool and vote it according to the wishes of the majority of the pool. *Held,* this contract, even though valid, should not be specifically enforced so as to vest in a pool, the control of a corporation with public functions. *Gleason* v. *Earles* (Wash. 1914) 139 Pac. 213.

Specific performance will, in general, be decreed where damages are inadequate compensation, and numerous decisions on the sale of stock hold that damages fail to give adequate compensation for the loss of the control of a corporation. *Sherwood* v. *Wallin* (1905) 1 Cal. App. 532; *Rumsey* v. *New York & P. R. R.* (1902) 203 Pa. 579; *O'Neill* v. *Webb* (1898) 78 Mo. App. 1. There has, however, been some doubt cast upon the validity of pooling agreements on grounds of public policy. *Cf. Bridgers* v. *Staton* (1909) 150 N. C. 216; *Morel* v. *Hoge* (1908) 130 Ga. 625; *contra, Faulds* v. *Yates* (1870) 57 Ill. 416. But even where they are held valid, public policy forbids their specific performance when the rights of third parties, *e. g.,* minority stockholders, are endangered, and in the case of banking companies and other corporations of a semi-public character, like that involved in the principal case, the interests of the public at large are also to be considered as opposed to the placing of the corporation in the control of the pool by such a decree. *Gage* v. *Fisher* (1895) 5 N. Dak. 297; *Foll's Appeal* (1879) 91 Pa. 434. In the dearth of authority it is difficult to deduce a rule, *cf.* 1 Thompson, Corporations, § 904, but the policy of the law in looking askance on pooling agreements and being sparing of the remedy of specific performance appears to justify the decision in the principal case.

COURTS—JURISDICTION—NON-RESIDENTS.—A foreign corporation doing business in New York, was sued by a non-resident in a tort action arising outside the State. *Held,* the court had jurisdiction in its discretion, but would not exercise it in favor of a non-resident. *English* v. *New York, N. H. & H. R. R.* (N. Y. 1914) 146 N. Y. Supp. 963.

Although the right of non-residents to sue in domestic courts on transitory causes of action is treated by some jurisdictions as absolute under § 2 Art. 4 of the federal Constitution, *Eingartner* v. *Illinois Steel Co.* (1896) 94 Wis. 70, 77; *Cofrode* v. *Circuit Judge* (1890) 79 Mich. 332, the better view is that this right is granted only as a matter of comity, and that the exercise of jurisdiction in such cases is in the discretion of the court. *Johnson* v. *Dalton* (N. Y. 1823) 1 Cow. 543; *Great Western Ry.* v. *Miller* (1869) 19 Mich. 305; see *Morris* v. *Missouri Pacific Ry.* (1890) 78 Tex. 17. The inconvenience and danger of injustice, the expense imposed on the resident citizens, and the clogging of the court calendars with foreign litigation have caused such suits to be regarded with disfavor, see *Burdick* v. *Freeman* (1887) 46 Hun 138; *Collard* v. *Beach* (1903) 81 App. Div. 582; *contra, Johnson* v. *Trade Ins. Co.* (1882) 132 Mass. 432; *Reeves* v. *Southern Ry.* (1905) 121 Ga. 561, and these same considerations have been

applied to the case where one party is a foreign corporation. *Central Ry. Co.* v. *Carr* (1884) 76 Ala. 388; *cf. Johnson* v. *Trade Ins. Co., supra; Reeves* v. *Southern Ry., supra.* Aside from the question of policy, the New York Code Civil Procedure, § 1780, which enumerates the cases in which a non-resident may sue a foreign corporation is exclusive in its wording, and as it stood when the principal case was commenced did not provide for such a cause of action; hence it is difficult to see how the court had jurisdiction of the subject matter, though it had jurisdiction of the person of the defendant. In the future, suits like the one in the principal case would be governed by a provision which has since been added, N. Y. Code Civ. Proc. § 1780 sub-sec. 4, allowing a non-resident to sue a foreign corporation doing business in the State.

CRIMINAL LAW—DOUBLE JEOPARDY—WHEN JEOPARDY ATTACHES.—The defendant had pleaded not guilty to a former indictment and now pleads double jeopardy to the second indictment for the same offense. *Held,* his pleading to the first indictment did not constitute former jeopardy. *People* v. *Stanton* (N. Y. 1914) 84 Misc. 101.

The old common law rule that jeopardy attaches only after a verdict, see *Commonwealth* v. *Olds* (Ky. 1824) 5 Littells *137; *State* v. *Moor* (Miss. 1823) Walker 134, has been generally repudiated; and by the weight of authority to-day jeopardy in criminal prosecutions attaches as soon as the jury has been empanelled and sworn to try the cause, upon a sufficient indictment before a court of competent jurisdiction. Cooley, Const. Lim. (7th ed.) 467 et seq.; *Ex parte Glenn* (C. C. 1901) 111 Fed. 257; *People ex rel. Stabile* v. *Warden* (1911) 202 N. Y. 138; *Williams* v. *Commonwealth* (1879) 78 Ky. 93. There are, however, exceptional circumstances which make the discharge of the jury possible after that time without prejudice to future proceedings in the same matter. Wharton, Criminal, Law (11th ed.) 520, as the withdrawal of a juror with the consent of the defendant, expressed or implied, see *Ex parte Glenn, supra,* the sudden illness of defendant, *King* v. *Stevenson* (1791) Leach 618, incapacitating illness of a juror, *People* v. *Ross* (1890) 85 Cal. 383, illness of the presiding judge, *Nugent* v. *State* (Ala. 1833) 4 Stew. & Port. 72, or inability of the jury to agree after sufficient time. *Dreyer* v. *Illinois* (1902) 187 U. S. 71. The general rule thus limited, it appears, administers substantial justice by attaching jeopardy soon enough to assure the accused his constitutional right, and by providing exceptions to prevent justice from being defeated. It is, moreover, well recognized that jeopardy never attaches until the jury has been sworn and the principal case is, therefore, in conformity with the general rule, since no jury has been empanelled or sworn. *McFadden* v. *Commonwealth* (1853) 23 Pa. 12.

CRIMINAL LAW—LOTTERIES—POPULARITY CONTEST.—The defendant's newspaper conducted a contest in which the person receiving the most votes was to be given an automobile. The ballots for this purpose were to be given free to its subscribers and advertisers, and were sold to merchants for purposes of distribution. *Held,* the defendant was not guilty of promoting a lottery. *Commonwealth* v. *Jenkins* (Ky. 1914) 166 S. W. 794.

It is generally recognized that to constitute a lottery three elements must concur; a consideration, chance, and a prize. See *Equitable Loan Co.* v. *Waring* (1903) 117 Ga. 599, 609. If nothing is given for

the chance, there is no lottery; *Yellow-Stone Kit* v. *State* (1889) 88 Ala. 196; but the consideration paid for the article with which the chance is given is consideration for the chance, *People* v. *Lavin* (1904) 179 N. Y. 164, 168, even though the article is intrinsically worth the purchase price. *United States* v. *Wallis* (D. C. 1893) 58 Fed. 942. Similarly, the element of chance must be present, for the vice of the lottery lies in the chance to win a greater sum than that paid. See *Stevens* v. *Times-Star Co.* (1905) 72 Ohio St. 112, 152. Prize concerts, *Negley* v. *Devlin* (N. Y. 1872) 12 Abb. Pr. [N. S.] 210, guessing contests, *Waite* v. *Press Pub. Assn.* (C. C. A. 1907) 155 Fed. 58, and subscription schemes, *State* v. *Mumford* (1881) 73 Mo. 647, have been condemned because of this element, and it is immaterial that every ticket holder receives something, if the prizes are unequal in value. *Randle* v. *State* (1875) 42 Tex. 580. If the award depends on the skill or judgment of the contestants, *Eastman* v. *Armstrong-Byrd Music Co.* (C. C. A. 1914) 212 Fed. 662, or on the conscious act and will of the ticket holders, *Dion* v. *St. John Baptiste Society* (1890) 82 Me. 319, the project is legitimate, since the mere winning of prizes is not prohibited if the element of chance is lacking. It seems clear, therefore, that in the principal case, where the award was to be made to the person receiving the highest number of votes, the distribution depends not on chance, but on the energy and popularity of the candidate, and the scheme is therefore valid. *Quatsoe* v. *Eggleston* (1903) 42 Ore. 315.

CRIMINAL LAW—SALE OF INTOXICATING LIQUORS—CLUBS.—The defendant club, which dispensed liquor to its members in exchange for money, was indicted for selling liquors without a license. *Held,* the transaction was a "sale" by a "person", under Ch. 418, Vol. 14, Laws of Delaware. *State* v. *Delaware Saengerbund* (Del. 1914) 91 Atl. 290.

Actions like that in the principal case are always decided under statutes, and the peculiarities of the particular statute under which they arise must always be considered in interpreting a decision. The statutes are divided into two classes, the so-called "Dramshop Acts", regulating the conduct of those dealing in liquors as a business, and the more general statutes in which no such limitation is expressed. Under the "Dramshop Acts" two points are involved. First, is the transaction a sale, and if it is a sale, is it by one dealing in liquors as a business? Under the second point arises the question whether the club is *bona fide* or merely a subterfuge. *Bona fide* clubs are usually not considered as dealers within the meaning of the statute, *State* v. *St. Louis Club* (1894) 125 Mo. 308; *contra, People* v. *Soule* (1889) 74 Mich. 250, while clubs which are mere devices are generally deemed to be "dramshops." *Rickett* v. *People* (1875) 79 Ill. 85. Under the broader statutes the only question raised is whether the transaction is a sale. On this point the decisions are irreconcilable. Some courts here apply the test of whether the club is *bona fide* or mere device, *People* v. *Adelphi Club* (1896) 149 N. Y. 5, a test which is obviously out of place under statutes regulating all sales of liquor. See *Newark* v. *Essex Club* (1890) 53 N. J. L. 99, 102. Other authorities hold that the transaction is not a sale and offer widely differing suggestions as to its true identity, none of them satisfactory. *Klein* v. *Livingston Club* (1896) 177 Pa. 224; *Seim* v. *State* (1880) 55 Md. 566; *Graff* v. *Evans* (1882) L. R. 8 Q. B. D. 373; Wertheimer, Law Relating to Clubs (4th ed.) 25. The transaction, however, seems clearly to be a

sale, since the title passes from the entity to the individual members of the club. See *Newark* v. *Essex Club, supra,* p. 103; *People* v. *Soule, supra,* p. 263. For this purpose the club may be considered as an entity whether or no it be incorporated. See *Marmont* v. *State* (1874) 48 Ind. 21.

DOWER—DEVISES IN LIEU OF DOWER—NECESSITY OF ELECTION UNDER NEW YORK REAL PROPERTY LAW.—The testator, after other bequests, left the residue of all his property to his wife and two children, share and share alike. Seven years after the probate of the will, the widow brought suit for her dower rights in real property situated in New York. *Held,* one justice dissenting, since there were no provisions in the will inconsistent with dower rights, she was therefore not driven to make an election under Chapter 50, §§200, 201 of the New York Consolidated Laws. *Roessle* v. *Roessle* (1913) 81 Misc. 558, reversed (App. Div. 1914) 148 N. Y. Supp. 659.

The testator left his wife a cash bequest and his house and the furniture contained therein for life, and devised the remainder of his estate on trust, the income thereof to be equally divided between his wife and minor son. *Held,* the widow was forced to elect between the provisions under the will and her right to dower in the residuary estate. *Matter of Springsteen* (Surr. Ct., N. Y. 1914) 86 Misc. 389. See Notes, p. 585.

EVIDENCE—PAROL EVIDENCE TO VARY OBLIGATION OF THE INDORSER OF A NEGOTIABLE INSTRUMENT.—In an action on promissory notes the defendant prays that the amount of other unpaid notes indorsed to him by the plaintiff be deducted from the amount due on the notes in suit. *Held,* parol evidence is admissible to show that the indorsement was merely to pass title and not to obligate the plaintiff. *Mott* v. *Causey* (Ark. 1914) 165 S. W. 636.

In general, parol evidence is inadmissible to contradict the legal effect of an indorsement, which the law regards as a written contract. *Martin* v. *Cole* (1881) 104 U. S. 30; *Skelton* v. *Dustin* (1879) 92 Ill. 49. As between the indorser and his immediate indorsee or subsequent transferee with notice of the facts, however, most courts have recognized exceptions to this rule; see *Dale* v. *Gear* (1871) 38 Conn. 15; as when the indorsee takes for collection only, *Lawrence* v. *Stonington Bank* (1827) 6 Conn. 521; *Johnston* v. *Schnabaum* (1908) 86 Ark. 82, or when the indorsement is merely to pass title without obligating the indorser, *First Nat. Bank* v. *Reinman* (1910) 93 Ark. 376; *Bailey* v. *Stoneman* (1884) 41 Ohio St. 148, or where an equity is raised between the parties *dehors* the instrument. *Case* v. *Spaulding* (1856) 24 Conn. 578; *Hudson* v. *Wolcott* (1884) 39 Ohio St. 618. These exceptions, to be sure, are so extensive as practically to nullify the general rule, but they are frequently mentioned by courts to justify the admission of parol evidence in certain cases. Though it is impossible to reconcile all the decisions on the subject, the weight of authority undoubtedly supports the principal case, and so long as the defense is not permitted as against innocent purchasers for value, the admission of parol evidence in cases of this sort would seem to serve the ends of justice.

EVIDENCE—SEXUAL CRIMES WITH CONSENT—OTHER ACTS.—In a prosecution for statutory rape, *held,* evidence of subsequent acts of sexual

intercourse between the parties was admissible. *People* v. *Thompson* (N. Y. 1914) 106 N. E. 78.

Although in criminal prosecutions evidence of other similar crimes will generally be excluded, *Fish* v. *United States* (C. C. A. 1914) 215 Fed. 544; *People* v. *Grutz* (1914) 212 N. Y. 72, there are exceptions to this rule. See note to *People* v. *Molineaux* (1901) 168 N. Y. 264, 2 Columbia Law Rev. 39; *People* v. *Duffy* (1914) 212 N. Y. 57. One of these exceptions is that in prosecutions for sexual crimes with consent, evidence of other recent acts of intercourse between the parties is admitted to show the existence of a sexual disposition in the defendant toward the prosecutrix. 4 Chamberlayne, Evidence § 3226. When such inclination has been proved, there is a strong inference that there has been indulgence where opportunity is given and slight circumstances of guilt appear, because of the continuous nature of sexual relations. *State* v. *Sebastian* (1908) 81 Conn. 1; *Thayer* v. *Thayer* (1869) 101 Mass. 111; 1 Wigmore, Evidence § 399. When desire has been shown to exist by evidence of prior acts, it may be considered an impulse or tendency to further intercourse. In the case of subsequent acts, however, the disposition thereby confirmed can be looked upon only as a continuation of such emotion, which possibly might have arisen subsequent to the date of the crime alleged, and for this reason some courts refuse to admit evidence of subsequent acts. *State* v. *Palmberg* (1906) 199 Mo. 233; *People* v. *Clark* (1876) 33 Mich. 112; 1 Wharton, Crim. Evid. § 42. However, as a practical matter, no such distinction should be made, since the strength of the contingency of intervening circumstances between the act alleged and the acts proved, whether prior or subsequent, is the same. 1 Wigmore, Evidence § 399. When both prior and subsequent acts of intercourse between the parties are offered in evidence, there should be no question as to the admissibility of either, since an emotional chain has been established, arching the act set forth in the indictment, and it is therefore of the strongest probative force. *State* v. *Reineke* (Ohio 1914) 106 N. E. 52; see *Lawson* v. *State* (1852) 20 Ala. 65.

HOMESTEAD—PROPERTY SUBJECT—UNDIVIDED INTEREST.—Plaintiff attacked the assignment of a homestead in an undivided interest in land. *Held,* the assignment was valid so long as the other co-tenants did not object. *Kelly* v. *McLeod* (N. C. 1914) 81 S. E. 455.

Since the object of the homestead exemption laws is to secure a home to the debtor and his family, it is generally held that the exemption applies not only where the debtor owns his home absolutely, but also where his interest merely gives him the right to immediate possession. *Lozo* v. *Sutherland* (1878) 38 Mich. 168; 2 Tiffany, Real Property § 499, p. 1127; but see *Swan* v. *Walden* (1909) 156 Cal. 195. A tenant in common has such a right, and the fact that in some future partition his homestead may fall to a co-tenant is no reason for depriving him of the present benefit of the statute, for the policy of the statute does not require that his title be perpetual. *Kaser* v. *Haas* (1881) 27 Minn. 406; *contra, West* v. *Ward* (1870) 26 Wis. 579. Even though the co-tenant is damaged in setting off the homestead, he alone can object, and a creditor may not attack the homestead on that ground. *Kaser* v. *Haas, supra;* see *Brokaw* v. *Ogle* (1897) 170 Ill. 115. Many courts, however, will not allow a homestead in such cases, because the homestead contemplated by the statute is a specific parcel of land capable of being set apart by metes and bounds. *West*

v. *Ward, supra; Joyce* v. *J. I. Case etc. Co.* (1890) 89 Tenn. 337; *Nance* v. *Hill* (1866) 26 S. C. 227. The majority of courts, applying the doctrine that exemption laws are to be liberally construed in favor of the debtor, disregard this difficulty. *McClary* v. *Bixby* (1863) 36 Vt. 254; Thompson, Homesteads & Exemptions §§ 181 et seq. But the difficulty may be better avoided by restraining seizure of the debtor's interest until there can be a partition setting apart to him in severalty the land in which he may take his homestead, *Nance* v. *Hill, supra,* or if this is impracticable, the debtor can be allowed money compensation for the value of the homestead. See *Thorn* v. *Thorn* (1862) 14 Iowa 49.

INDIANS—JURISDICTION—STATE AND FEDERAL COURTS.—In a criminal prosecution against an Indian for assaulting another Indian on a reservation, *held,* 35 U. S. Stat. L., conferring on the federal courts jurisdiction of certain crimes committed by an Indian against another Indian "within the boundaries of any State * * * and within the limits of any Indian reservation", applies to a New York Indian reservation, title to which was never in the United States. *People* v. *Daly* (N. Y. 1914) 105 N. E. 1048.

In an action between Onondaga Indians as to the possession of lands within their reservation, *held,* the New York court had jurisdiction, but should apply the customary laws of the Onondagas except where the legislature had imposed state laws instead. *George* v. *Pierce* (N. Y. Sup. Ct. 1914) 148 N. Y. Supp. 230. See Notes, p. 587.

INTERSTATE COMMERCE—POWER OF CONGRESS TO REGULATE INTRASTATE RATES.—Rates charged by carriers out of Dallas and other points into eastern Texas, an intrastate transit, were much lower than those from Shreveport, Louisiana, into Texas, an interstate transit, under substantially similar conditions and circumstances. *Held,* Congress, under the commerce clause, has power to control rates maintained by a carrier under state authority in order to remove the unjust discrimination against interstate commerce. *Houston, E. & W. T. Ry.* v. *United States* (1914) 34 Sup. Ct. Rep. 833. See notes, p. 583.

JUDGMENTS—VOID EXECUTION SALE—RELIEF OF PURCHASER.—H recovered a judgment against the defendant which he assigned to the plaintiff who issued execution thereon after H's death, acting under the mistaken belief that such execution would be valid. Pursuant to the execution lands of the defendant were sold by the sheriff to the plaintiff. Discovering that the execution was void, the plaintiff moved to have the sale set aside. The court granted the motion, and the plaintiff now sues on the original judgment. *Held,* he may recover the entire amount of the judgment. *Chilton* v. *Harris* (Mo. 1914) 166 S. W. 1084.

In general, a purchaser at an execution sale is treated by the courts as a mere volunteer, see *Horne* v. *Nugent* (1896) 74 Miss. 102, bound by the doctrine of *caveat emptor,* 3 Freeman, Executions (3rd ed.) § 335; *Talley* v. *Schlatitz* (1904) 180 Mo. 231, and acquiring the identical title of the judgment debtor as under a quitclaim deed. *Butler* v. *Fitzgerald* (1895) 43 Neb. 192. But where the execution is void, conferring no power of sale on the sheriff, as where the judgment debtor dies before execution and there has been no revivor, no title can be conveyed, see *Meyer* v. *Mintonye* (1883) 106 Ill. 414, and the purchaser may defend an action for the purchase price on the

ground of lack of consideration. *Laughman* v. *Thompson* (Miss. 1846) 6 Sm. & M. 259. The judgment creditor, if he is at the same time the purchaser, is therefore remitted to his action on the original judgment. *Keith* v. *Proctor* (Tenn. 1874) 8 Baxt. 189. The rule of *caveat emptor* does not apply to such a case, as no question of the kind of title conveyed is involved, for no title whatever passes by virtue of the sale. Even under the quitclaim deed analogy, a grantee of such a deed, though bound by the title of his grantor is entitled to a valid deed, and if the instrument is void, the grantee ought not be forced to accept.

JOINT ADVENTURES—MUTUAL GOOD FAITH—SECRET PROFITS.—A, the assignee of 25 per cent of the author's royalties, secured the producing rights of a play. He then entered into a joint venture with B to produce the play, concealing his right to royalties. These he subsequently assigned to the plaintiff, who knew all the facts, and who, as the assignee through A, of the author's rights, seeks to enforce them against A and B. *Held,* the fund assigned to the plaintiff was impressed with a trust in favor of the joint adventure, and the plaintiff therefore took his rights subject to this equity. *Selwyn* v. *Waller* (N. Y. Ct. of Appeals) N. Y. L. J., Oct. 7, 1914.

The same result was reached in an adverse criticism of the decision in the lower court, which is reversed by the Court of Appeals in the principal case. 14 Columbia Law Rev. 539.

LIBEL AND SLANDER—PRIVILEGE—PUBLICATION OF PLEADINGS.—The defendant published pleadings defamatory to the plaintiff which, though filed, had not been brought to the attention of the court. *Held,* The publication was not privileged. *Lundin* v. *Post Publishing Co.* (Mass. 1914) 104 N. E. 480. See notes, p. 594.

LICENSES—REVOCATION—THEATRE TICKETS CONSIDERED AS IRREVOCABLE LICENSES.—In a suit against the proprietors of a moving picture theatre, *held,* that the sale of a theatre ticket confers upon the vendee an enforcible right to enter the premises and see the performance. *Hurst* v. *Picture Theatre, Ltd.* (Eng. 1914) Not yet reported. 51 N. Y. L. J. 1522.

The weight of authority in England and America has been that a theatre ticket is merely a revocable license. *Wood* v. *Leadbitter* (1845) 13 M. & W. 838; *Burnham* v. *Flynn* (1905) 189 N. Y. 180. Accordingly, no tort action has been allowed where purchasers of theatre tickets have been refused admittance or made to leave the theatre. *Burton* v. *Scherpf* (Mass. 1861) 1 Allen 133; *Honey* v. *Nixon* (1905) 213 Pa. 20. It is admitted, however, that an action may be maintained for breach of the contract implied from the sale of the ticket, although the damages are usually limited to the price paid and the expenses incident to attending the performance. *Buenzle* v. *Newport Amusement Assn.* (1908) 29 R. I. 23; *Luxenberg* v. *Keith & Proctor Co.* (N. Y. 1909) 64 Misc. 69. Some courts, however, have adopted the view that a person whose ticket is revoked without cause may, where the facts warrant it, recover compensatory damages for wounded feelings, even when the action is brought on contract, see *Aaron* v. *Ward* (1911) 203 N. Y. 351; *Smith* v. *Leo* (N. Y. 1895) 92 Hun 242, and in at least one jurisdiction, in a tort action arising from the exclusion of a ticket-holder, punitive damages were awarded. *Weber-Stair Co.*

v. *Fisher* (Ky. 1909) 119 S. W. 195. The principal case, however, squarely attacks the established position by holding that the grant of a right to see the performance for consideration renders the license to enter the premises irrevocable. While this establishes a new rule, it would seem to be justified in view of the quasi-public position occupied by theatres at the present day. See *People* v. *King* (1888) 110 N. Y. 418; *Greenberg* v. *Western Turf Assn.* (1903) 140 Cal. 357.

LIMITATION OF ACTIONS—ADMINISTRATORS—ACTIONS FOR WRONGFUL DEATH.—In a statutory action brought by an administrator for the wrongful death of his intestate, *held,* since the statute conferred a new right, the administrator may bring his action, even though the decedent's right of action was barred at the time of his death by the Statute of Limitations. *Causey* v. *Seaboard etc. R. R.* (N. C. 1914) 81 S. E. 917.

A statute conferring upon the personal representative a right of action for wrongful death is not regarded as continuing the decedent's common law action for personal injuries. See *Best* v. *Town of Kingston* (1890) 106 N. C. 205; *Rodman* v. *Missouri Pac. Ry.* (1902) 65 Kan. 645. The administrator's right of action accrues, therefore, at the time of the death, and it is generally held that the Statute of Limitations does not begin to run against it until that time. *Hoover's Admrs.* v. *Chesapeake etc. Ry.* (1899) 46 W. Va. 268; see *Louisville etc. R. R.* v. *Clark* (1894) 152 U. S. 230. In a few jurisdictions, however, the courts construe the statute as conferring no right of action unless the deceased had the right to sue at the time of his death, and if the statute was at that time a bar to him, it is held to be a bar to the personal representative. *Kelliher* v. *New York Central & H. R. R.* (N. Y. 1914) 105 N. E. 824; *Williams* v. *Mersey Docks etc.* [L. R. 1905] 1 K. B. 804. The rule in the principal case, which is supported by the weight of authority, appears to be preferable, since the right of action conferred is entirely separate and distinct from that of the deceased. *Donnelly* v. *Chicago Ry.* (1911) 163 Ill. App. 7; *German etc. Trust Co.* v. *Lafayette etc. Co.* (1912) 52 Ind. App. 211. It should be observed, however, that where the statute gives the personal representative the right to sue merely for injuries to the decedent, the right of action is, in effect, a revival of that of the decedent, and as such is barred if his was barred. *Birmingham* v. *Chesapeake etc. Ry.* (1900) 98 Va. 548.

NEGOTIABLE INSTRUMENTS—PAYEE AS HOLDER IN DUE COURSE.—The maker of a note which the defendant, as accommodation indorser, had signed before its completion, disregarded certain conditions and exceeded his authority in filling out the blanks. The payee, who now sues on the note, was a purchaser in good faith. *Held,* the payee was a holder in due course within the Negotiable Instruments Law, §§ 14, 16, and could therefore recover. *Liberty Trust Co.* v. *Tilton* (Mass. 1914) 105 N. E. 605.

At common law an innocent payee of a note, signed in blank and fraudulently filled up, was allowed to recover from the maker or indorser, either on the ground that he was a *bona fide* purchaser for value, *Johnston Harvester Co.* v. *McLean* (1883) 57 Wis. 258; *Weidman* v. *Symes* (1899) 120 Mich. 657, or on the doctrine of estoppel. *Humphreys* v. *Finch* (1887) 97 N. C. 303; see 1 Daniels, Neg. Inst. (6th ed.) §§ 142-143. Although it seems that the Negotiable Instruments

Law has not changed the common law rule, *Boston Steel & Iron Co.* v. *Steuer* (1903) 183 Mass. 140; see *Herman's Exr.* v. *Gregory* (1909) 131 Ky. 819, some cases hold otherwise on a technical construction of the statute, that the payee cannot be a "holder in due course", as this term is only applicable to one who takes the instrument from another who is a holder. *Vander Ploeg* v. *Van Zuuk* (1907) 135 Ia. 350; *cf. Herdman* v. *Wheeler* [L. R. 1902] 1 K. B. 361. This construction seems too narrow to be supported, for an innocent payee is substantially in the position of a *bona fide* transferee, and no reason appears why the statute intended to deny him the same rights. Even assuming that the payee is not protected as a holder in due course, since the statute has not displaced the ordinary common law of contract, the defendant is estopped in a proper case from denying his liability, without reference to the statute. *Lloyds Bank* v. *Cooke* [L. R. 1907] 1 K. B. 794. By applying this doctrine the payee could recover under the circumstances of the principal case even where relief is denied under the statute.

NEGOTIABLE INSTRUMENTS—TRANSFER WITHOUT INDORSEMENT—RIGHTS OF TRANSFEREE.—The defendant corporation made an order note for the accommodation of the payee who indorsed it to the order of a *bona fide* purchaser, who in turn transferred it to the plaintiff for value, without indorsement. In an action on the note the corporation defends on the ground that the note was accommodation paper and therefore *ultra vires*. *Held,* construing §§49, 58, 191 of the Negotiable Instruments Law, that the defense could not be urged against the plaintiff. *Smith* v. *Nelson Land & Cattle Co.* (C. C. A. 1914) 212 Fed. 56.

The rule that where a negotiable instrument is unindorsed the transferee acquires no better title than his transferror, and is subject to the same defenses, *Goshen Nat. Bank* v. *Bingham* (1890) 118 N. Y. 349, is codified by the Negotiable Instruments Law, §49, which makes the transferee without indorsement of order paper the assignee of such paper. *Mayers* v. *McRimmon* (1906) 140 N. C. 640. Therefore, where there is a defense to an instrument, as where a corporation makes an accommodation note, see *Mapes* v. *German Bank* (C. C. A. 1910) 176 Fed. 89, a transferee of the payee without indorsement takes subject to the defense. When, however, a negotiable instrument reaches the hands of a *bona fide* purchaser its position as negotiable paper is established, and any person acquiring it thereafter by indorsement holds free from all defenses. *Miles* v. *Dodson* (1912) 102 Ark. 422; *Montclair* v. *Ramsdell* (1882) 107 U. S. 147. The sound view, both in theory and in practice, is that even when the instrument is unindorsed, the transferee should have the same protection. See *Langford* v. *Varner* (1896) 65 Mo. App. 370. The maker after a transfer by a holder for value occupies no worse position than he did before. Moreover, it would be paradoxical to give a clear title to a *bona fide* purchaser and then deny him the power to dispose of it freely in the business world. Daniel, Negotiable Instruments (6th ed.) §803.

NUISANCES—OPERATION OF RAILROADS—RIGHT TO COMPENSATION.—In an action for damages against the defendant railroad for disturbances and loud noises proceeding from the operation of a switchyard, *held,* a nuisance was created entitling the plaintiff to recover. *Matthias* v. *Minneapolis, St. P. & S. Ste. M. Ry.* (Minn. 1914) 146 N. W. 353.

In an action to enjoin the defendant railroad from carrying on terminal operations, *held,* the plaintiff was not entitled to the relief, since the operations were not carried on unreasonably or negligently. *Hearst* v. *New York Central & Hudson R. R. R.* (App. Div., 1st Dept. 1914) 148 N. Y. Supp. 586. See notes, p. 590.

OFFICERS—QUO WARRANTO—TITLE OF RELATOR.—The information in quo warranto shows the defendants were appointed to a board of education under a statute afterwards declared unconstitutional, but fails to show authority for the appointment of the relators to the board. *Held,* private relators are not entitled to judgment of ouster in quo warranto, unless they show title to the office in themselves. *Dunham* v. *Bright* (N. J. 1914) 90 Atl. 255.

In general, actions in the nature of quo warranto fall under four heads. Where the information is filed in the name of the State, and the State is regarded as a real party in interest, judgment of ouster may be rendered against the respondent, though the relator's claim to the office be invalid. *Snowball* v. *People* (1893) 147 Ill. 260; *People* v. *Knox* (N. Y. 1885) 38 Hun 236; see *Gano* v. *State* (1859) 10 Ohio 237. Where the information is filed in the name of the State but the relator is regarded as the real and only party in interest, he must show a good title in himself, before a judgment of ouster will be rendered against the respondent, even though the latter's title be bad. *Andrews* v. *State* (1892) 69 Miss. 740; *State* v. *Boal* (1870) 46 Mo. 528. Where the information is filed in the name of the relator, and he is the real party in interest, he must prove his title as in the class of cases foregoing. *Manahan* v. *Watts* (1900) 64 N. J. L. 465. Where the information is filed in the name of the relator but the State is still regarded as a real party in interest, the respondent must justify or be ousted whether the relator have title or not. *Crovatt* v. *Mason* (1897) 101 Ga. 246. In any case the relator must be shown to have an interest in the matter, *Crovatt* v. *Mason, supra,* and this has frequently been held to necessitate proof of the relator's title to the office. *Jones* v. *State* (1887) 112 Ind. 193. The decisions on this subject are by no means uniform, as the action in the nature of quo warranto is everywhere governed by statute, but the rule that obtains where the information is filed in the name of the relator, and he is the real party in interest, would appear to have been correctly applied in the principal case.

SALES—IMPLIED WARRANTY—INNKEEPERS.—The plaintiff alleges that after eating at the defendant's restaurant she became sick, owing to the unwholesomeness of the food, and sues for breach of an implied warranty that it was wholesome and fit for consumption. *Held,* there was no implied warranty, for a restaurant-keeper does not sell his food but only gives the guest the privilege of consuming it. *Merrill* v. *Hodson* (Conn. 1914) 91 Atl. 533.

Although at common law an innkeeper was held not to be a trader within the meaning of the Bankruptcy Law, in that he did not sell but only "uttered" his provisions, *Saunderson* v. *Rowles* (1767) 4 Burr. 2064; *Harman* v. *Clarkson* (1872) 22 Upp. Can. C. P. 291, it has, nevertheless, been held in several states, that a restaurant keeper may be convicted under a statute making the sale of certain impure foods a criminal offense. *Commonwealth* v. *Warren* (1894) 160 Mass. 533; *Commonwealth* v. *Hendley* (1898) 7 Pa. Sup. Ct. 356. It is true, as the principal case points out, that a guest may bring an action

in tort for negligence, *Pantaze* v. *West* (1913) 7 Ala. App. 599; *Doyle* v. *Fuerst & Kraemer* (1911) 129 La. 838, but the burden of proving the negligence is upon the plaintiff. *Sheffer* v. *Willoughby* (1896) 163 Ill. 518; *Crocker* v. *Baltimore Dairy Lunch Co.* (1913) 214 Mass. 177. It must be admitted that the principal case in declaring that a restaurant-keeper does not sell his food, is supported by a considerable body of authority. Beale, Innkeepers & Hotels § 169; Burdick, Sales (3rd ed.) 25. But in view of the present day status of restaurants where the line between them and vendors of provisions has become well nigh imperceptible, and in view of the extreme difficulty of proving negligence and thereby obtaining relief, it would seem that the New York court in holding that a guest may sue a restaurant-keeper for breach of the implied warranty of wholesomeness has adopted a position preferable to that laid down in the principal case. *Leahy* v. *Essex Co.* (1914) 148 N. Y. Supp. 1063.

SPECIFIC PERFORMANCE—CONTRACTS TO MAINTAIN RAILWAY STATIONS.—J. P. granted to the lessor of the defendant railroad a right of way over his lands in consideration that it establish a flag station near his dwelling. The heir of J. P. sues for specific performance. *Held,* in absence of proof that public interests would be detrimentally affected, a decree should issue. *Parrott* v. *Atlantic & N. C. R. R.* (N. C. 1914) 81 S. E. 348.

Agreements of railroads with private individuals to establish stations are *per se* void and unenforcible from considerations of public policy, where the terms of the contract restrict the carrier from locating other stations, *St. Louis etc. R. R.* v. *Mathers* (1874) 71 Ill. 592, or where the agreement was consummated by paying some director or officer of the railroad for the privilege. *Fuller* v. *Dame* (Mass. 1836) 18 Pick. 472; *McGuffin* v. *Coyle* (1906) 16 Okla. 648; 1 Elliott, Railroads (2nd ed.) § 362. If neither of these extraneous elements is present, however, an agreement with a private party to locate a station does not conflict with public policy, and breach of the contract gives rise to an action against the company for damages. *Louisville etc. Ry.* v. *Whipps* (1904) 118 Ky. 121; *Atlantic etc. R. R.* v. *Camp* (1908) 130 Ga. 1; see note 14 Ann. Cas. 441; but see *Burney* v. *Ludeling* (1895) 47 La. Ann. 73. Since the damages in such cases are often inadequate and speculative, equity should decree specific performance, were it not for the reluctancy of that court to exercise its jurisdiction to enforce continuing agreements, *Texas & Pac. Ry.* v. *Marshall* (1890) 136 U. S. 393; Pomeroy, Specific Performance (2nd ed.) § 312; but *cf. Raphael* v. *Thames Valley Ry.* (1867) L. R. 2 Ch. App. 147, in absence of strong considerations of public policy to favor such enforcement. See *Joy v. St. Louis* (1890) 138 U. S. 1. If, therefore, the plaintiff does not affirmatively show that the public interests will be injuriously affected through the abandonment of the station, he should be left to his remedy at law. See *Herzog* v. *Atchison T. & S. F. R. R.* (1908) 153 Cal. 496. Nevertheless, by the weight of authority specific performance is granted in the absence of proof by the defendant that the public interests will be prejudiced. *Taylor* v. *Florida etc. Ry.* (1908) 54 Fla. 635. Where, however, as in the principal case, the plaintiff has conveyed real property to the defendant in reliance upon his promise to erect a structure thereon, the decree is justified. Pomeroy, Specific performance (2nd ed.) § 23.

STATUTE OF FRAUDS—SUFFICIENCY OF WRITING—SIGNATURE OF AGENT.—H, acting as agent for the defendant, his undisclosed principal, signed a memorandum of sale in his individual capacity. In an action for breach of the contract of sale, the defendant set up the Statute of Frauds. *Held,* since the contract is valid as against H, it is valid as against the defendant. *Langstroth* v. *J. C. Turner Cypress Lumber Co.* (1914) 148 N. Y. Supp. 224.

In order to satisfy the requirements of the Statute of Frauds a memorandum of sale must contain all the essential terms of the contract, *Reigart* v. *Coal & Coke Co.* (1909) 217 Mo. 142, must identify the parties showing the relation of buyer and seller, *Grafton* v. *Cummings* (1878) 99 U. S. 100; see *American Iron etc. Co.* v. *Midland Steel Co.* (1900) 101 Fed. 200, and must be signed by the party to be charged therewith or his lawfully authorized agent. Burdick, Sales (3rd ed.) 47. Where the agent signs as agent but the name of his principal does not appear, the contract is void, for the agent by signing as such denies all personal liability, and as the principal is unnamed, the instrument does not show anyone liable thereon. 7 Columbia Law Rev. 284; *Mertz* v. *Hubbard* (1907) 75 Kan. 1; *Mentz* v. *Newwitter* (1890) 122 N. Y. 491; *contra, Tobin* v. *Larkin* (1903) 183 Mass. 389. Where, however, the agent signs the memorandum in his individual capacity he makes himself personally liable, *De Remer* v. *Brown* (1901) 165 N. Y. 410. The contract, therefore, complies with the requirements of the Statute of Frauds above stated and is valid. Under the well settled but anomalous rule of agency the undisclosed principal may be shown by parol evidence, *Higgins* v. *Senior* (1841) 8 M. & W. 834, 844, and thus discovered may sue, *Usher* v. *Daniels* (1905) 73 N. H. 206, or be sued on the instrument, *Dykers* v. *Townsend* (1861) 24 N. Y. 57; see *Case* v. *Case* (1911) 203 N. Y. 263, as though his name appeared thereon. The conflict in the former class of cases arises out of the fact that courts fail to distinguish between undisclosed and unnamed principals, *Tobin* v. *Larkin, supra,* and the principal case in making the distinction, is clearly in accord with established principles.

STATUTES—CONSTRUCTION—ADOPTION FROM ANOTHER STATE.—In an action on a South Dakota statute adopted from Illinois, *held,* the court is bound by the construction of the Illinois statute by the courts of that State. *Plowman* v. *Morden* (S. Dak. 1914) 146 N. W. 914.

When a statute is adopted from another State a presumption arises that its construction by the Supreme Court of that State is also adopted, *Ryalls* v. *Mechanics' Mills* (1889) 150 Mass. 190; *Besser* v. *Alpena Cir. Judge* (1909) 155 Mich. 631, which may, however, be rebutted by showing that such construction would be unsound in principle, *Ancient Order of Hibernians* v. *Sparrow* (1903) 29 Mont. 132; see *Rhea* v. *State* (1902) 63 Neb. 461, or contrary to the constitution of the adopting State, *Risser* v. *Hoyt* (1884) 53 Mich. 185, or to the spirit and policy of its laws, *Smith* v. *Dayton Iron Co.* (1905) 115 Ten. 543; see *Moore* v. *O'Leary* (Mich. 1914) 146 N. W. 661, or would conflict with a previous decision of the Supreme Court of the adopting State on a statute substantially similar. *Sutton* v. *Heinzle* (1911) 85 Kan. 332. There is no presumption of such intent on the part of the legislature where a provision is introduced indicating the contrary intent, *Missouri Pac. Ry.* v. *State* (1904) 69 Kan. 552, or where the statute was adopted from a State which in turn adopted

it from a third State. *Coulam* v. *Doull* (1889) 133 U. S. 216. Where the presumption arises and is not rebutted, the construction by a court of the State from which the statute was adopted has the same force as if by the corresponding court of the adopting State. *Morgan* v. *State* (1897) 51 Neb. 672. The construction is therefore not binding unless by the highest court capable of passing on the question, *Smith* v. *Baker* (1897) 5 Okl. 326, because a statute does not receive a settled construction until it has reached such court. *Andrews* v. *Hovey* (1888) 124 U. S. 694.